(3)

No. 02-658

Supreme Court, U.S.
FILED
JAN 2 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

KELLY A. JOHNSON
Acting Assistant Attorney General

JOHN C. CRUDEN
Deputy Assistant Attorney General

ANDREW J. DOYLE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

29 pp

QUESTION PRESENTED

Whether Sections 113(a)(5) and 167 of the Clean Air Act, 42 U.S.C. 7413(a)(5) and 7477, authorize the Environmental Protection Agency to issue administrative orders to prevent construction of a major emitting facility where a state permitting authority is prepared to grant the facility operator a "prevention-of-significant-deterioration" air quality permit based on an arbitrary and capricious application of the statutory requirement that such sources of air pollution be subject to the best available control technology.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Argument	12
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979)	4, 16, 18
American Corn Growers Ass'n v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002)	14
Bethlehem Steel Corp. v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984)	15
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 837 (1984)	23
Department of Hous. & Urban Dev. v. *Rucker*, 122 S. Ct. 1230 (2002)	19
Florida Power & Light Co. v. *EPA*, 650 F.2d 579 (5th Cir. 1981)	15
General Motors Corp. v. *United States*, 496 U.S. 530 (1990)	3-4
Public Serv. Co. v. *EPA*, 225 F.3d 1144 (10th Cir. 2000)	17
Sur Contra La Contaminacio'n v. *EPA*, 202 F.3d 443 (1st Cir. 2000)	5
Train v. *NRDC, Inc.*, 421 U.S. 60 (1975)	4, 12, 13, 14, 23
Union Elec. Co. v. *EPA*, 427 U.S. 246 (1976)	13, 14
United States v. *AM General Corp.*, 34 F.3d 472 (7th Cir. 1994)	16

Cases—Continued: Page

Virginia v. *EPA*, 108 F.3d 1397, modified on other other grounds, 116 F.3d 499 (D.C. Cir. 1997) 14
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 3

Statutes and regulations:

Clean Air Act, 42 U.S.C. 7401 *et seq.*:
§ 107(a), 42 U.S.C. 7407(a) 3
§§ 108-109, 42 U.S.C. 7408-7409 3
§ 110, 42 U.S.C. 7410 ..... 3, 12
§ 110(a)(1)-(2), 42 U.S.C. 7410(a)(1)-(2) 3
§ 110(a)(2)(C), 42 U.S.C. 7410(a)(2)(C) 4
§ 110(*o*), 42 U.S.C. 7410(*o*) 6
§ 113, 42 U.S.C. 7413 14
§ 113(a), 42 U.S.C. 7413(a) 15
§ 113(a)(5), 42 U.S.C. 7413(a)(5) ..... *passim*
§ 113(b), 42 U.S.C. 7413(b) 21
§§ 160-169, 42 U.S.C. 7470-7479 13
§ 161, 42 U.S.C. 7471 4
§ 165(a), 42 U.S.C. 7475(a) 4, 11
§ 165(a)(1), 42 U.S.C. 7475(a)(1) 4
§ 165(a)(3), 42 U.S.C. 7475(a)(3) 16
§ 165(a)(4), 42 U.S.C. 7475(a)(4) 4, 16, 18
§ 165(d)(1), 42 U.S.C. 7475(d)(1) 6
§ 167, 42 U.S.C. 7477 ..... *passim*
§ 169(1), 42 U.S.C. 7479(a)(1) 4
§ 169(3), 42 U.S.C. 7479(3) 5, 11, 18, 19
§§ 169A-169B, 42 U.S.C. 7491-7492 13
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 21
Alaska Admin. Code tit. 18:
§ 50.400(c)(3)(A)(1983) 5
§ 50.900(9)(1991) 5
40 C.F.R.:
Section 51.100(g) 6
Section 52.21 6
Section 52.96(a) 4

Miscellaneous: Page

EPA, *New Source Review Worshop Manual* (1990) 5
57 Fed. Reg. (1992):
p. 28,093 22
p. 28,095 22
58 Fed. Reg. (1993):
p. 10,957 22
p. 10,961 22
63 Fed. Reg. (1998):
p. 13,795 ..... 6, 22
p. 13,796 ..... 6, 22
p. 13,797 6
H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. (1977) 19
S. Rep. No. 127, 95th Cong., 1st Sess. (1977) 19, 23
http://www.epa.gov/airtrends/nitrogen.html. 7

In the Supreme Court of the United States

No. 02-658

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 298 F.3d 814. A prior order of the court of appeals addressing its subject matter jurisdiction (Pet. App. 17a-23a) is reported at 244 F.3d 748.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. The petition for a writ of certiorari was filed on October 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 113(a)(5) of the Clean Air Act (CAA or the Act), 42 U.S.C. 7413(a)(5), provides:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—
>
> (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;
>
> (B) issue an administrative penalty order in accordance with subsection (d) of this section, or
>
> (C) bring a civil action under subsection (b) of this section.
>
> Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

Section 167 of the CAA, 42 U.S.C. 7477, provides:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not

> subject to an implementation plan which meets the requirements of this part.

STATEMENT

Petitioner seeks review of a decision of the court of appeals arising from three administrative orders of the Environmental Protection Agency (EPA) issued under the CAA. Petitions for review were filed challenging, among other things, EPA's statutory authority to issue the orders. The court of appeals denied the petitions, upholding EPA's invocation and exercise of authority under Sections 113(a)(5) and 167 of the CAA, 42 U.S.C. 7413(a)(5) and 42 U.S.C. 7477.

1. The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality. Under it, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). A prime example of this partnership exists in one of the central features of the Act: national ambient air quality standards (NAAQS). The CAA requires EPA to establish NAAQS for certain air pollutants. 42 U.S.C. 7408-7409; *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462 (2001). States, in turn, play a "statutory role as primary *implementers* of the NAAQS." *American Trucking*, 531 U.S. at 470. Each State is to draft and submit to EPA for approval a state implementation plan (SIP) that, *inter alia*, provides for the attainment and maintenance of the NAAQS. See 42 U.S.C. 7407(a), 7410; *American Trucking*, 531 U.S. at 470. States have considerable discretion in developing the specific rules to which operators of pollution sources within their borders are subject; EPA must approve a SIP so long as it meets the criteria of 42 U.S.C. 7410(a)(1)-(2). See *General Motors*, 496 U.S. at

533. However, EPA is "charged with the administration of the Act[] and made ultimately responsible for the attainment and maintenance of the national standards." *Train* v. *NRDC, Inc.*, 421 U.S. 60, 93-94 n.28 (1975).

EPA and the States also share responsibilities in "clean air areas," *i.e.*, areas of the country in which the NAAQS for a given pollutant have been met or for which insufficient data exist to know whether they have been met. State implementation plans are to include a program to prevent significant deterioration of air quality in clean air areas, which include much of the State of Alaska. 42 U.S.C. 7410(a)(2)(C), 7471; Pet. App. 3a. EPA approved Alaska's Prevention of Significant Deterioration (PSD) program in 1983. 40 C.F.R. 52.96(a). In clean air areas, the CAA prohibits the construction or modification of large sources of air pollution (*i.e.*, "major emitting facilities") unless and until their operator secures a PSD permit. See 42 U.S.C. 7475(a), 7479(a)(1). Section 165(a)(1) of the CAA outlines several preconstruction "requirements" applicable to covered sources through a PSD permit. 42 U.S.C. 7475(a)(1).

"[P]rincipal" among these PSD requirements is that covered sources of air pollution be "subject to the best available control technology" (BACT) to minimize emissions of regulated air pollutants. 42 U.S.C. 7475(a)(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 407 (D.C. Cir. 1979). BACT is defined under the CAA, in pertinent part, as

> an emission limitation based on the maximum degree of reduction of each [covered] pollutant * * * emitted from * * * any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility.

42 U.S.C. 7479(3).[1] While the CAA does not mandate a specific type of emissions control technology for a particular type of source, permitting authorities commonly follow EPA's recommended "top-down" approach in determining what is BACT for a given source. Pet. App. 13a (citing EPA, *New Source Review Workshop Manual* (1990)). See, *e.g.*, *Sur Contra La Contaminacion* v. *EPA*, 202 F.3d 443, 446 n.3 (1st Cir. 2000). Under that approach,

> the applicant ranks all available control technologies in descending order of control effectiveness. The most stringent technology is BACT unless the applicant can show that it is not technically feasible, or if energy, environmental, or economic impacts justify a conclusion that it is not achievable. If the top choice is eliminated, then the next most stringent alternative is considered, and so on. The most effective control option not eliminated is BACT.

Pet. App. 13a (citation omitted). Petitioner purported to follow the "top-down" approach in arriving at the BACT determination at issue in the EPA orders before the court of appeals. *Ibid.*

PSD permitting authorities, typically state agencies (like petitioner), bear primary responsibility to ensure that BACT and the other preconstruction requirements

---

[1] Alaska's federally-approved PSD program contains a parallel BACT requirement. See Alaska Admin. Code tit. 18, § 50.400(c)(3)(A) (1983); Alaska Admin. Code tit. 18, § 50.900(9) (1991).

of the PSD program are satisfied.[2] Indeed, permitting authorities have "significant discretion" in making PSD permit decisions. 63 Fed. Reg. 13,795, 13,796, 13,797 (1998). But EPA also plays an important oversight role following approval of a State's PSD program. The CAA directs permitting authorities to keep EPA informed of every PSD permit application and "of every action related to the consideration of such permit." 42 U.S.C. 7475(d)(1). In the majority of instances, beyond proffering comments, EPA finds no reason to take an active role in PSD permit decisions.

In those rare occasions where a permitting authority acts outside the bounds of its discretion, the CAA does authorize EPA to take action. Section 113(a)(5) of the CAA provides that on the basis of "any available information," EPA may "find[] that a State is not acting in compliance with *any* requirement or prohibition" of the PSD permit program. 42 U.S.C. 7413(a)(5) (emphasis added). To remedy a permitting authority's noncompliance, the CAA grants EPA a broad range of options. Specifically, under Sections 113(a)(5) and 167 of the CAA, EPA may: (1) "issue an order prohibiting the construction or modification" of the proposed source; (2) "issue an administrative penalty order" if construction or modification has already commenced; (3) "bring a civil action" for injunctive relief or civil penalties; and (4) "take such measures * * * as necessary to prevent the construction or

[2] Not all PSD permitting authorities are States. Counties or other local entities may assume permitting responsibility on behalf of a State. See 40 C.F.R. 51.100(g). An Indian Tribe may also be a permitting authority if it has an EPA-approved program. See 42 U.S.C. 7410(o). Additionally, EPA itself serves as a PSD permitting authority in areas that have no approved program. See 40 C.F.R. 52.21.

modification" of the proposed source. 42 U.S.C. 7413(a)(5), 7477. This case involves EPA's invocation and exercise of Sections 113(a)(5) and 167 of the CAA to prevent construction of a proposed source based on an unlawful PSD permit issued by petitioner.

2. Teck Cominco Alaska Incorporated (Cominco) operates a mine in northwestern Alaska that is the largest producer of zinc concentrates in the world. Pet. App. 3a-4a; see RER 46-001.[3] Cominco produces its own electricity at the mine. In 1998, Cominco submitted to petitioner an application for a PSD permit. Cominco sought permission, among other things, to increase the amount of emissions of nitrogen oxide (NOx), a regulated air pollutant, from one of its six existing 5,000 kilowatt diesel-fired power generators (labeled "MG-5").[4] Cominco urged the permitting authority to require, as BACT for MG-5, an emission control technology known as "Low NOx." Preliminarily, petitioner disagreed with Cominco; it opined that a more stringent type of technology—selective catalytic reduction (SCR)—should be installed as BACT on the modified generator. Pet. App. 4a; see RER 17-030, 17-040, 17-042. In fact, petitioner found that operating MG-5 at Cominco's requested level with SCR, rather than Low NOx, would reduce emissions of the pollutant by more than 450 tons per year—a 10-fold difference. See RER 17-043.

[3] "RER" refers to Respondents' Supplemental Excerpts of Record filed in the court of appeals. "PER" refers to Petitioners' Excerpts of Record filed in the court of appeals.

[4] NOx "play[s] a major role in the formation of ozone, particulate matter, haze, and acid rain." www.epa.gov/airtrends/nitrogen.html (last visited December 19, 2002).

In 1999, Cominco amended its PSD permit application. The amended application requested a permit to construct an entirely new generator, "MG-17." As with the equally-powerful MG-5, Cominco urged petitioner to require Low NOx as BACT for MG-17, which would be less costly than SCR. At the same time, Cominco offered to "retrofit" its six existing generators, including MG-5, with Low NOx. Petitioner was inclined to agree with Cominco's latest proposal and issued a draft permit decision to that effect. Pet. App. 4a.

EPA, as well as the National Park Service,[5] raised concerns with petitioner about its draft permit decision. EPA's view was that the facts and analysis in petitioner's own permit record supported only a conclusion that SCR, not Low NOx, was the best available control technology for the MG-5 and MG-17 generators. EPA explained that "the PSD program does not allow the imposition of a limit that is less stringent than BACT even if the equivalent emission reductions are obtained by imposing new controls on other emission units." Pet. App. 5a; RER 47-001. Petitioner subsequently agreed with EPA that it was improper for purposes of determining BACT on MG-17 to consider Cominco's offer to retrofit Low NOx on existing generators. PER 045.[6] It is undisputed that operating MG-17 with SCR, as opposed to Low NOx, would reduce emissions of NOx by 90%. PER 044, 045.

---

[5] The National Park Service administers land 32 miles from Cominco's mine. The closest residential communities to the mine are the native villages of Kivalina and Noatak (16 and 20 miles, respectively). RER 36-018, 46-001.

[6] Cominco discovered that retrofitting existing engines would allow it to obtain a sufficient increase in power without triggering BACT review on any of them. See RER 55-002, 55-003; PER 043, 053, 132, 234.

Despite several meetings with EPA, petitioner and Cominco continued to insist that Low NOx, not SCR, qualified as the best available control technology for MG-17. Pet. App. 5a. On December 10, 1999, EPA issued petitioner a finding of noncompliance and order —the first of the three administrative orders before the court of appeals. See *id.* at 26a-37a. Pursuant to Section 113(a)(5), EPA found that petitioner would not be in compliance with the CAA and Alaska's implementation plan if petitioner issued the permit as then drafted (*i.e.*, with a determination that best available control technology for MG-17 was Low NOx). EPA explained the factual basis for that finding in a cover letter to the order. PER 234-235. In sum, EPA concluded that petitioner's BACT determination was arbitrary, capricious, and unsupported by petitioner's own record and analysis. Additionally, pursuant to Section 167 of the CAA, EPA directed petitioner not to issue the permit unless and until it made a valid BACT determination. See Pet. App. 36a-37a.[7]

Notwithstanding EPA's order, petitioner issued a PSD permit to Cominco later that same day. The permit purported to authorize construction of MG-17 with an operating emissions limitation based on a determination that Low NOx constituted BACT. Petitioner's "foremost consideration" in rejecting SCR in favor of Low NOx was to "support" Cominco's mining project and "its contributions to the region." Pet. App. 15a; PER 051. At the same time, however, petitioner's

---

[7] After petitioner in fact issued the permit, EPA later withdrew the portion of the December 10, 1999, finding and order that ordered petitioner not to do so, stating that "the Order does not impose any continuing prohibitions or obligations to [petitioner]." See Pet. App. 19a.

report "fail[ed] to explain how the costs of SCR would affect the Mine's world competitiveness or why the capital cost is excessive." Pet. App. 15a. See PER 050-51.

In early February 2000, EPA renewed its finding that petitioner had failed to comply with federal and state PSD requirements. Pet. App. 5a; RER 5-002. On the same date, to ensure that Cominco would not commence construction under a PSD permit that EPA concluded was invalid, EPA issued the second of the three orders before the court of appeals. That order directed Cominco not to commence construction of MG-17 until it obtained a valid PSD permit. See Pet. App. 38a-50a. EPA amended the February order in March 2000; it reaffirmed the findings and conclusions of the February order but allowed Cominco to conduct some limited, weather-sensitive construction activity. Pet. App. 6a; see *id.* at 51a-64a.

All three of EPA's administrative orders hinged on a finding that petitioner did not subject the proposed source of air pollution to best available control technology and, therefore, did not act in compliance with the Clean Air Act in issuing the PSD permit. See Pet. App. 35a-36a, 47a, 49a, 60a, 62a.

3. Petitioner and Cominco petitioned for review of EPA's orders. They argued primarily that the CAA did not authorize EPA's action. While conceding that "EPA has considerable oversight and control over how states run their PSD permitting programs," petitioner and Cominco contended that such authority did not extend to a state permitting authority's BACT determination. Pet. C.A. Opening Br. 56. See *id.* at 53; Pet. C.A. Reply Br. 24, 29.

After oral argument and supplemental briefing on various legal and factual issues, the court of appeals

rejected the challenge brought by petitioner and Cominco to EPA's statutory authority. Examining the plain meaning of Sections 113(a)(5), 165(a), 167, and 169(3) of the CAA, the Ninth Circuit concluded that subjecting MG-17 to BACT was a PSD preconstruction "requirement" within the meaning of those provisions. As such, the BACT requirement fell within EPA's authority to find that petitioner was "not acting in compliance with any requirement" of the PSD program. 42 U.S.C. 7413(a)(5). While recognizing that "the state has discretion to make BACT determinations as the permitting authority," the court of appeals found no legal basis to exclude BACT determinations altogether from the scope of EPA's oversight and enforcement authority. Pet. App. 10a. Furthermore, given the breadth of remedies available to EPA where a finding of noncompliance has been made, the court found that EPA's remedial decisions to issue "orders were authorized by the plain language of Section 113(a)(5) * * * and of Section 167." *Id.* at 9a. Finally, the court of appeals confirmed its plain reading of the CAA with support from the Act's structure and legislative history. *Id.* at 9a-11a.

The Ninth Circuit also rejected the alternative argument made by petitioner and Cominco that EPA erred in its construction of the facts, *i.e.*, EPA's finding that petitioner misapplied the BACT requirement. Applying an "arbitrary or capricious" standard of review, the court of appeals found that EPA's findings were adequately supported. Indeed, the court agreed that petitioner's own permit record

> shows that (1) Cominco failed to meet its burden of demonstrating that SCR was economically infeasible; and (2) [petitioner] failed to provide a reasoned

justification for its elimination of SCR as a control option.

Pet. App. 16a. The court noted that petitioner's "apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy" is "uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority —to protect states from industry pressure to issue ill-advised permits." *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA's oversight and enforcement authority under Sections 113(a)(5) and 167 of the Clean Air Act extends to a permitting authority's determination of what constitutes the best available control technology for a covered source of air pollution such as Cominco's diesel-fired generator. The Ninth Circuit's construction of the Clean Air Act does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioner's contention (Pet. 14-15), the court of appeals' opinion does not conflict with *Train* v. *NRDC, Inc.*, 421 U.S. 60 (1975), or any other decision of this Court. The Court in *Train* construed Section 110 of the CAA, which sets forth the requirements for approval by the EPA of a State's CAA implementation plan—its SIP. See 421 U.S. at 75-98. The Court's analysis in *Train* focused almost entirely on the various provisions of Section 110 and their relationship to one another. The Court in *Train* did not construe the materially different Sections 113(a)(5) and 167 of the CAA, which do not concern the requirements for EPA approval of a SIP and which were neither cited nor discussed in the Court's opinion in *Train*. Indeed,

Train was decided before the 1977 enactment of the PSD program at issue here (42 U.S.C. 7470-7479, 7491-7492) and the 1990 broadening of Section 113(a)(5) to include "*any* requirement" of the PSD program. See EPA C.A. Br. 58-59. And the Court in *Train upheld* EPA's construction of the provisions at issue in that case as "sufficiently reasonable that it should have been accepted by the reviewing courts," 421 U.S. at 75, a decision that gives no support to petitioner's effort to *reject* EPA's construction of the different provisions at issue here.

Moreover, contrary to petitioner's contention (Pet. 14), there is no inconsistency between *Train*'s discussion of the federal-state framework of the CAA and that applied by the court of appeals in this case. The issue in *Train* was whether EPA correctly approved Georgia's NAAQS implementation plan. Included in Georgia's SIP was "a variance procedure whereby particular sources could obtain individually tailored relief from general requirements." 421 U.S. at 69. The Court concluded that EPA appropriately limited its review of Georgia's SIP to whether "the ultimate effect of [the] State's choice of emission limitations is in compliance with the national standards," as opposed to directing what particular mix of emission limitations the State must promulgate into law. *Id.* at 79. Accord *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976), cited at Pet. 15. Thus, *Train* involved the scope of EPA's authority to approve a SIP, not, as here, the scope of EPA's authority to oversee requirements of the CAA after a SIP has been approved.

Indeed, while it was not formally at issue in *Train*, the Court expressly recognized EPA's oversight role in that case. The Court stated that no air polluter could be granted a variance "until first the State, *and then*

the Agency, have determined that [it] will not jeopardize the [NAAQS]." *Train*, 421 U.S. at 93-94 n.28 (emphasis added). See, *e.g.*, *Union Elec.*, 427 U.S. at 252-253 n.3. Additionally, the Court observed that the CAA "imposes a duty of enforcement *on the Agency*" to enforce a SIP's emission limitations. *Train*, 421 U.S. at 92-93 n.27 (emphasis added) (citing the predecessor version of Section 113 of the CAA). Consequently, it is the position of petitioner, not the decision of the court of appeals, that is inconsistent with *Train*. See *id.* at 93-94 n.28 (as between the States and EPA, EPA is "ultimately responsible for the attainment and maintenance of the national standards"); Pet. App. 10a-11a (as between the States and EPA, "EPA has the ultimate authority to decide whether a state has complied with the BACT requirements of the Act and the state SIP.").

2. Nor does the court of appeals' decision conflict with that of any other court of appeals. Petitioner refers (Pet. 15-19) to three decisions of the D.C. Circuit, two decisions of the Seventh Circuit, and one decision of the Fifth Circuit. None of those decisions conflicts with the decision of the court of appeals in this case.

a. Four of the six decisions cited by petitioner involved issues not unlike that in *Train*—*i.e.*, the scope of EPA's authority in approving or dictating the contents of state implementation plans. In *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1, 5-9 (D.C. Cir. 2002), the D.C. Circuit vacated a particular method of weighing statutory factors promulgated by EPA as part of a rule implementing a provision of the CAA aimed at reducing haze in national parks and guiding States on the content of SIP revisions to that effect. In *Virginia* v. *EPA*, 108 F.3d 1397, 1403-1415, modified on other grounds, 116 F.3d 499 (1997), the D.C. Circuit invali-

dated an EPA rule directing States to update their SIPs with motor vehicle emission restrictions equivalent to those of California. In *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1035 (1984), the Seventh Circuit found error in EPA's "partial approval" of a SIP whereby EPA attempted to make a state law "more stringent on its face than the state had ever intended it to be." And, in *Florida Power & Light Co.* v. *EPA*, 650 F.2d 579, 588 (1981), the Fifth Circuit reversed an EPA rulemaking in which EPA "insist[ed] * * * on incorporating into Florida's SIP a state pollution variance provision that is irrelevant to state compliance with the Clean Air Act." Like *Train* itself, none of those four decisions involved an issue of the type before the court of appeals in this case—the scope of EPA's authority to oversee a permit decision in a State with an approved SIP.[8] Nor did any of those four decisions involve provisions like Sections 113(a) and 167, which on their face grant EPA broad authority to "prohibit[] * * * the construction or modification of any major stationary source" where "a State is not acting in compliance with any requirement * * * of the chapter relating to the construction of new sources," 42 U.S.C. 7413(a)(5), and provide that EPA "shall * * * take such measures * * * as necessary to prevent the construction or modification of a * * * facility which does not conform to the requirements of" the statutory provisions designed to protect clean air areas, 42 U.S.C. 7477.

---

[8] For example, while the D.C. Circuit in *American Corn Growers* found that EPA's rule purported to limit the States' ability to apply statutory factors, it did not (and had no occasion to) address EPA's authority to find that a State's application of those factors to any particular facts was unlawful.

Petitioner's attempt to rely (Pet. 16-17) on *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 361, 363-364 (D.C. Cir. 1980), is equally mistaken. The portion of *Alabama Power* relied upon by petitioner dealt solely with the requirement not to pollute above specified increments (Section 165(a)(3)), which is separate and distinct from the BACT requirement (Section 165(a)(4)). See 636 F.2d at 361-364. Furthermore, while the D.C. Circuit did decline environmental groups' invitation to order EPA to "prescribe the manner in which states will manage their allowed internal growth," the court recognized EPA's authority to "prevent or correct a violation of the increments." 636 F.2d at 361, 364. That recognition is consistent with the court of appeals' ruling in this case.

Likewise, there is no conflict between *United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994), and the court of appeals' decision in this case. In *AM General*, EPA issued a finding of state noncompliance and commenced an enforcement action after the permitting authority issued the permit and the operator modified its source in reliance on that permit. See *id.* at 474-475. While not sustaining that course of action, the Seventh Circuit did opine that EPA *could* have had a proper cause of action under Section 113(a)(5) if, as here, EPA issued a finding of noncompliance before the source operator proceeded with the modification. *Ibid.*[9]

b. If anything, there is consistency, not conflict, among the courts of appeals with respect to the scope of

[9] Petitioner's stated concerns (Pet. 19) that EPA could "invalidate a BACT determination * * * months, even years, after a permit has been issued" are inapposite on the facts of this case, where EPA acted *before* the permit was issued.

EPA's oversight and enforcement authority under the CAA's PSD program. In *Public Service Co.* v. *EPA*, 225 F.3d 1144 (2000), the Tenth Circuit held that it lacked subject matter jurisdiction to review opinion letters issued by EPA to a state permitting authority, in which EPA relayed its view that an operator of a proposed source needed a PSD permit. As part of its reasoning that EPA had not taken any "final agency action," the court stated:

> The EPA letters do not * * * cause a direct and immediate impact upon * * * the company actually seeking a permit * * * because it is [Colorado] as the permitting agency, and not the EPA, which will initially determine whether * * * a PSD permit is required. *Although the EPA ultimately could overturn any decision rendered by [Colorado]*, the opinion expressed in the two letters serves more like a tentative recommendation than a final and binding determination.

225 F.3d at 1147 (emphasis added; citing, among other authorities, 42 U.S.C. 7413(a)(5)). The Tenth Circuit in *Public Service*, like the court of appeals here, recognized that while States assume primary, first-instance duties, *inter alia*, to comprehensively review and make permit decisions about proposed new sources of air pollution, Congress intended EPA to retain a significant oversight and enforcement role even after it approves a plan that allows a State to become the PSD permitting authority. No court of appeals has stated or even suggested to the contrary.

3. The court of appeals' decision is correct. There is no question that EPA has "considerable oversight and control over how states run their PSD permitting programs," as petitioner (and Cominco) conceded before

the court of appeals. Pet. C.A. Opening Br. 56. See *id.* at 53; Pet. C.A. Reply Br. 24, 29. Petitioner, nevertheless, now suggests that the court of appeals should have interpreted the CAA as preventing EPA from taking the action it did here in the face of what it found to be petitioner's "arbitrary and erroneous," Pet. App. 12a, application of the CAA's BACT requirement. In declining to adopt that construction of the statute, the court of appeals did not err.

a. Ensuring that permitting authorities render reasoned and factually supported BACT decisions falls well within EPA's responsibilities under the CAA and its PSD program. Section 113(a)(5) expressly grants EPA the oversight authority to "find[] that a State is not acting in compliance with any requirement" of the CAA's PSD program. 42 U.S.C. 7413(a)(5). That provision, together with Section 167, also sets forth a specific range of administrative and judicial remedies for such noncompliance. See 42 U.S.C. 7413(a)(5), 7477. EPA's authority under those provisions expressly extends to "*any* requirement" and the "requirements" of the PSD program. 42 U.S.C. 7413(a)(5), 7477 (emphasis added). One of those "requirements" is that a covered source of air pollution (like the diesel-fired MG-17 generator) be "subject to the best available control technology." CAA Section 165(a)(4), 42 U.S.C. 7475(a)(4).

No part of the CAA, including the definition of BACT in Section 169(3), purports to exclude BACT determinations from the scope of EPA's oversight and enforcement authority. Application of BACT controls is "one of the principal substantive prerequisites to obtaining a PSD permit." *Alabama Power*, 636 F.2d at 407. The legislative history further confirms the national importance of the BACT requirement and EPA's important

role in this area.[10] Had Congress intended to limit EPA's authority over this key aspect of the PSD program, it would not have employed broad language like "*any* requirement." 42 U.S.C. 7413(a)(5) (emphasis added). See *Department of Housing & Urban Development* v. *Rucker*, 122 S. Ct. 1230, 1233 (2002) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). Nor is the BACT requirement beyond EPA's oversight authority simply because the CAA contemplates that a permitting authority may exercise substantial discretion in arriving at "an emission limitation" that is "achievable" and "based on the maximum degree of reduction * * * taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. 7479(3). Nearly every part of a permit decision involves exercise of discretion on the part of the permitting authority. Nevertheless, as the court of appeals persuasively reasoned:

> It does not follow from the placement of initial responsibility with the state permitting authority that its decision is thereby insulated from the oversight and enforcement authority assigned to the EPA in other sections of the statute.

---

[10] See S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977) ("[T]here is a national requirement that each new major facility to be located in a clear air area install the best available control technology."); *ibid.* ("The Administrator's role is one of monitoring State actions * * * * The Administrator thus could go to court to stop a permit for activities which would exceed the increments of pollution or which otherwise did not comply with the requirements of [PSD], including use of best available control technology"); H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 153 (1977) ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit.").

Pet. App. 11a.

Petitioner, in fact, appears to concede (Pet. 14) that EPA may take enforcement action where a permitting authority fails altogether to consider one or more statutory factors in rendering a BACT decision. There is no functional distinction between complete failure to consider a statutory factor and what occurred in this case, *i.e.*, unreasoned or arbitrary application of factors. While purporting to consider the statutory factors and to follow the "top down" approach, petitioner failed to offer any reasoned or record support for its "foremost" reason to select Low NOx over SCR as BACT: general "support" for the mine's "contributions to the region." Pet. App. 15a.

b. Contrary to petitioner's suggestion, EPA has never construed the CAA as allowing it to simply "second-guess" or "substitut[e] its judgment" for that of a state permitting authority. Pet. (i), 16. Quite to the contrary, well before this litigation, EPA had stated that it may challenge a BACT determination only if the permitting authority has not "met all procedural norms, considered all available control technologies, *and given a reasoned justification of the basis of its decision.*" Pet. App. 12a (quoting a 1993 legal opinion from EPA's Office of General Counsel) (emphasis supplied by the court of appeals). The petition for certiorari does not challenge the court of appeals' substantive determinations that EPA correctly found that "Cominco failed to meet its burden of demonstrating that SCR was economically infeasible" and that petitioner "failed to provide a reasoned justification for its elimination of SCR as a control option." *Id.* at 16a. Accordingly, this case does not, as petitioner contends, present the question whether EPA may second-guess a State's BACT determinations at will. Instead, it presents the question whether EPA has any authority to act under Sections 113(a)(5) and 167, where a State has granted a permit based on a BACT determination for which there is no reasoned justification.[11]

4. Petitioners err in contending (Pet. 21) that the court of appeals' decision will cause "far-reaching" disruption to federal-state relations under the CAA. The federal-state framework applied by the court of appeals reflects EPA's longstanding and consistent construction of its oversight authority. As early as 1983, an EPA guidance document explained that

> [o]nce its PSD SIP provisions have been approved * * *, the State, rather than EPA, assumes primary responsibility for administering the PSD program. The Agency does not completely relinquish its obligations, however. Rather, it assumes an oversight function * * * * If the State fails to take appropriate action * * * EPA must take measures adequate to prevent the construction of the noncomplying source * * * * EPA retains PSD enforcement authority and, where appropriate, is expected to initiate PSD enforcement proceedings

---

[11] Although the EPA was correct in its determinations in this case, the availability of judicial review ensures that EPA will not usurp the States' authority in this area. For example, in enforcing a finding of noncompliance or order, EPA may have to convince a district court that the permitting authority arbitrarily or capriciously applied the BACT requirement. See Pet. App. 22a & n.1 (citing 42 U.S.C. 7413(b)). Similarly, where, as here, a court of appeals is convinced that EPA took a "final action" so as to invoke its subject matter jurisdiction, EPA must defend its finding of noncompliance under an arbitrary-or-capricious standard of review. 42 U.S.C. 7607(b)(1); Pet. App. 18a-21a.

> both before and after the PSD SIP revisions have been approved.

RER 69-003. See also RER 69-007 (advising that EPA may "utilize the provisions of § 167 to prevent a source from construction with a State-issued permit that EPA feels is invalid," and referencing "BACT requirements"). Similarly, a 1988 EPA guidance document provides that

> Because PSD permits are issued on a case-by-case basis, taking into consideration individual source factors, permitting decisions involve the exercise of judgment. However, although not an exhaustive list, any one of the following factors will normally be sufficient for EPA to find a permit "deficient" and consider enforcement action:
>
> * * * * *
>
> 2. BACT determination not based on a reasoned analysis.

Decl. of Douglas E. Hardesty, Attach. E, COM 70-002.[12] That construction was reinforced in a 1993 EPA legal opinion. See Pet. App. 12a. And, in response to comments in rulemakings approving various States' PSD programs, EPA has expressly restated its view of its oversight responsibilities. See 57 Fed. Reg. 28,093, 28,095 (1992) (Texas); 58 Fed. Reg. 10,957, 10,961 (1993) (Connecticut); 63 Fed. Reg. 13,795, 13,796 (1998) (Virginia).

EPA's reading of its authority is consistent with Congress's intent in granting EPA a limited but important

[12] EPA submitted this declaration (to which the above-quoted record document is attached) to the court of appeals pursuant to its invitation. See Pet. App. 7a, 22a.

oversight role. Absent EPA authority to prevent issuance of permits based on objectively unreasonable BACT determinations, some States might be tempted to engage in a destructive competition to attract industry through lax implementation of the environmental laws. This record shows why that is important. As the court of appeals recognized, petitioner's

> apparent motivation for the elimination of SCR—appreciation for Cominco's contribution to the local economy—is not an accepted justification in the top-down approach. Worse still, it is uncomfortably reminiscent of one of the very reasons Congress granted EPA enforcement authority—to protect states from industry pressure to issue ill-advised permits.

Pet. App. 16a (citing S. Rep. No. 127, *supra*, at 136).[13] In short, the court of appeals' decision maintains the federal-state partnership as historically and consistently construed by "the Agency charged with the administration of the Act." *Train*, 421 U.S. at 94 n.28.[14]

[13] Contrary to petitioner's suggestion (Pet. 20), there is no evidence that "more jobs" would be created if the permit could issue in this case. In fact, there was no evidence before petitioner that Cominco's operations would be any different if it installed SCR rather than Low NOx on MG-17. See Pet. App. 15a; EPA C.A. Br. 65.

[14] Insofar as any ambiguity exists in the statutory provisions before it, EPA's longstanding and consistent construction of its oversight authority is entitled to deference under step two of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
KELLY A. JOHNSON
Acting Assistant Attorney General
JOHN C. CRUDEN
Deputy Assistant Attorney General
ANDREW J. DOYLE
Attorney

JANUARY 2003